No. 85-495

In the Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, ET AL., PETITIONERS

v.

RONALD PHILBROOK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 requires a school board and teachers' union to accommodate further a teacher whose religious beliefs require that he miss approximately six days of work per year when the current union contract provides for three days of paid leave for mandatory religious observance and prohibits the use for religious observance of three days of paid leave provided by the contract for "necessary personal business" and when the school board allows additional days of unpaid leave for mandatory religious observance.

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INTEREST OF THE UNITED STATES

This case concerns the extent of an employer's obligation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to accommodate the religious beliefs and practices of employees. Pursuant to Title VII, the Attorney General and the Equal Employment Opportunity Commission have substantial responsibility for enforcement of federal laws providing for equal employment opportunity (see 42 U.S.C. 2000e-5(a) and (f)(1)).[1] In addition, the federal government is obligated

[1] The Attorney General also has responsibility for enforcement of a variety of other federal laws proscribing discrimination on

to comply with Title VII in its capacity as the nation's largest employer (42 U.S.C. 2000e-16; see also 5 U.S.C. 5550a (allowing federal employees to work overtime to restore hours taken off for religious observance)). Although this action was brought by a private plaintiff against a school board and a union, the issues raised are similar to those arising in suits brought by and against the federal government. Hence, the resolution of the issues presented in this case will directly affect the government's enforcement and compliance responsibilities under Title VII. The strong federal interest in these and related issues prompted our participation as amicus curiae in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), *Parker Seal Co.* v. *Cummins*, 429 U.S. 65 (1976), vacated and remanded, 433 U.S. 903 (1977), and *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971).

STATEMENT

Respondent Ronald Philbrook (Philbrook), a high school teacher, brought this action in federal district court for damages and equitable relief against petitioner Ansonia School Board (school board) and respondent Ansonia Federation of Teachers (union), alleging that the school board and union had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by failing reasonably to accommodate Philbrook's need to be absent from work on days of mandatory religious observance (J.A. 3-8). Title VII requires that an employer "reasonably accommodate" an employee's religious observance or practice unless doing so would cause "undue hardship" on the employer's business. See 42 U.S.C. 2000e-2(a), 2000e(j). Following a two-day trial, the district court dismissed the complaint on the ground that

account of religion, including those requiring nondiscrimination in housing (42 U.S.C. 3601 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c-6), and certain other federally protected activities (18 U.S.C. 245).

Philbrook had failed to prove a violation of Title VII. On appeal, the court of appeals reversed, holding that Philbrook had made out a prima facie case of religious discrimination under Title VII. The court of appeals also instructed the district court to determine on remand whether Philbrook's proposed accommodations would cause the school board "undue hardship."

1. Philbrook is a high school teacher of typing and business and, since 1968, has been a member of the Worldwide Church of God (Pet. App. 2a, 27a). Philbrook's religious beliefs require that he refrain from secular employment on designated holy days, the precise dates of which vary from year to year (*id.* at 2a, 27a-28a). Observance of the holy days would require Philbrook to miss an average of six school days each year (*ibid.*).

The school board's leave policies since 1968 have been established by a series of collective bargaining agreements entered into between the school board and the union (Pet. App. 3a, 28a-29a).[2] Although the leave policies have changed in certain respects since 1968, those provisions regarding leave for mandatory religious observance have remained basically the same. An employee is allowed three days of paid leave each year for mandatory religious observance. Days taken off for that purpose are not deducted from the 18 days of annual paid leave otherwise provided for by the agreement.[3] The collective bargaining agreements have consistently provided that the school board will deduct approximately one day's salary for each day of unauthorized absence.[4]

[2] Pertinent portions of the collective bargaining agreements since 1967 are reproduced at J.A. 71-101.

[3] The 1968-1969 agreement is the sole exception. Under that agreement, days taken off for religious holy days were deducted from available annual leave (see J.A. 75).

[4] There are approximately 180 days in the school year and the salary deduction is currently 1/180 of the employee's annual salary (Pet. App. 4a n.1; J.A. 63, 101). Prior to the 1971-1972 agreement,

The employee may use the other 18 days of paid annual leave, which currently may be accumulated over several years to 180 days, only for those purposes set out in the agreement. Some of the categories of leave have specified annual limits, separate from the overall 18-day ceiling. Mandatory religious observance is not a permissible purpose for use of any of the 18 days (Pet. App. 5a n.2; J.A. 99). Examples of permissible categories to which an employee may, within applicable limits, apply the 18 days of annual leave include a personal or immediate family illness, a death in the immediate family, a funeral, an immediate family wedding, graduation, or religious ceremony, and a national veterans or national or state teachers conference. See Pet. App. 4a-5a n.2; J.A. 98-99. Also included within the 18-day ceiling is a maximum of 3 days of paid annual leave for "necessary personal business," the scope and operation of which has been more expressly defined in each succeeding agreement.[5] Since 1978, the agreements have allowed employees to use one of the three days of necessary personal business leave without prior approval as long as the employee provides the immediate supervisor with 48-hour notice (J.A. 95, 99). Consistent with the general proscription on the use of any of the 18 days of annual leave for mandatory religious observance and with the more specific prohibition on the use of necessary personal business leave for a purpose covered by any other category of leave, the agreements since 1970 have expressly provided that necessary per-

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the deduction was 1/200 of the employee's annual salary (Pet. App. 4a n.1; J.A. 76, 78, 81).

[5] The 1982-1985 agreement excludes from "necessary personal business" any activity covered by any other leave category, including travel associated with any such provision. In addition, the agreement specifically excludes several activities, including attendance of, or participation in a marriage or sporting or recreational event, and the "[d]ay following marriage or wedding trip" (J.A. 100).

sonal business does not include any religious observance (*id.* at 80, 83, 86, 89, 92, 96, 100).

Since 1968, Philbrook has taken the three days of paid leave for mandatory religious observance allowed by the collective bargaining agreements. From the outset, the school board has permitted Philbrook to take *unpaid* leave for religious holidays in excess of the three days and, prior to 1976, Philbrook took some days of unpaid leave on religious holy days (Pet. App. 6a, 32a). Since 1976, however, Philbrook has taken no days of unpaid leave on account of religious holy days and has instead either worked or scheduled hospital visits on those days in order to charge the absence to annual leave (*ibid.*). Philbrook states that family financial needs prevented him from taking days of unpaid leave after 1976 (*ibid.*). The school board has rejected Philbrook's requests that the school board either allow him to apply "personal business" paid annual leave to religious holy days; pay him, when he takes "leave without pay" for religious reasons, the difference between the cost of a substitute (approximately $30 per day) and his salary (approximately $130); or allow him to make up for missed workdays by doing meaningful school work at other times (Pet. App. 6a-7a, 18a & n.9).

2. In 1973, Philbrook filed a complaint against the school board and the union with the state Commission on Human Rights and Opportunities and the federal Equal Employment Opportunity Commission (EEOC) (Pet. App. 7a). Both the state commission and the EEOC found reasonable cause to believe that the leave policy established by the collective bargaining agreements unlawfully discriminated against religion by preventing Philbrook from using "necessary personal business" paid annual leave for his days of religious observance in excess of three days (*ibid.*; J.A. 104-117). The state and federal agencies each undertook conciliation efforts, which failed to reach an accord among the parties (Pet. App. 7a; see J.A. 104-110, 118-123). In September

1977, the EEOC issued Philbrook a right-to-sue letter (Pet. App. 7a).

3. In December 1977, Philbrook filed a complaint in federal district court alleging that the school board and the union had violated Title VII and the Free Exercise Clause of the First Amendment. Following a two-day trial, the district court dismissed the complaint on the ground that Philbrook had failed to prove unlawful religious discrimination under either the First Amendment or Title VII (Pet. App. 26a-37a). According to the court, because Philbrook was entitled to take leave without pay he had "not been placed by the School Board * * * or by the Union * * * in a position of violating his religion or losing his job" (*id.* at 37a) and therefore he had failed to state a claim for relief (*id.* at 35a, 36a).[6]

4. The court of appeals reversed, reaching only the Title VII claim (Pet. App. 1a-21a).[7] The court first ruled that Philbrook had made out a prima facie case of unlawful religious discrimination (*id.* at 8a-11a). The court rejected the district court's apparent ruling that a valid claim of religious discrimination under Title VII requires a showing that the employee would be discharged for exercising his religious beliefs (*id.* at 11a-12a). The court also rejected the school board's defense that providing Philbrook with three days of paid leave and additional days of unpaid leave for religious observance satisfied Title VII (*id.* at 13a-15a). Even assuming that the school board's accommodation was "reasonable," the court held, Title VII's duty to accommodate the religious beliefs of employees requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business (*id.* at 14a).

[6] The sincerity of Philbrook's religious beliefs is not an issue before the Court. While expressing "some doubts" about the sincerity of Philbrook's religious beliefs, the trial court declined to make any finding concerning their sincerity (Pet. App. 33a-34a). The court of appeals also assumed the sincerity of his beliefs (*id.* at 9a).

[7] In remanding the case to the district court for further proceedings, the court of appeals noted that the "First Amendment issues remain open, if [Philbrook] should lose on the Title VII issues on remand" (Pet. App. 21a n.12). Philbrook's Free Exercise claim is not currently before the Court.

The court of appeals also rejected the school board's claim that the district court's dismissal of Philbrook's complaint should nonetheless be affirmed because the current record demonstrates that Philbrook's proposed accommodations would, as a matter of law, cause undue hardship (Pet. App. 16a-17a). With respect to Philbrook's proposal that the school board allow him to use "necessary personal business" leave, the court conceded that "[t]he critical factual question * * * is the past and current scope of [that] leave provision[]" (*id.* at 16a). The court was uncertain, however, of the scope of the "necessary personal business" category,[8] and concluded that "if the * * * provision is as broad as [Philbrook] claims, it becomes difficult to believe that dropping the religious exception causes undue hardship" (*id.* at 16a-17a (footnote omitted)).

The court similarly refused to reject out-of-hand Philbrook's alternative proposal that the school board should pay him the difference between the cost of the substitute and his salary and allow him to make up for time off (Pet. App. 17a). The court explained that the trial court had not yet focused on the cost of the proposed accommodation nor considered possible ways to minimize those problems (*ibid.*).

Finally, the court of appeals took issue with the district court's and the school board's suggestion that Philbrook was seeking subsidization of his religious beliefs and impermissible preferential treatment based on those

[8] The court explained that while "[t]he provision does include the words 'legitimate and necessary' [it] le[aves] unsaid * * * whether leaving the reason to the teacher's discretion abrogates this limiting language" (Pet. App. 16a).

beliefs, contrary to this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977) (Pet. App. 18a-20a). The court stressed that Philbrook "has offered to pay the cost of the substitute and to make up for time off: [he] does not ask for payment for time when he is not working" (*id.* at 18a & n.9). The court did not address the school board's argument that the proposed accommodations would violate the Establishment Clause, leaving the issue open on remand (*id.* at 20a n.11).

One judge dissented from the panel opinion (Pet. App. 22a-24a). The dissent argued that the paid leave policy was facially neutral and, while perhaps inadequate, did not constitute employment discrimination within the meaning of Title VII (*id.* at 22a-23a). "Paid leave from employment," the dissenting judge reasoned, "is neither contractually nor Constitutionally mandated" (*id.* at 24a).

SUMMARY OF ARGUMENT

1. Title VII of the Civil Rights Act of 1964 makes unlawful employment practices that discriminate on the basis of an employee's religion and in addition includes the affirmative obligation that employers reasonably accommodate the religious beliefs of their employees unless such accommodation would cause undue hardship to the conduct of their business. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977). The courts below sharply differed in their construction of this mandate, but in our view, both courts misread Title VII.

Contrary to the opinion of the district court, Title VII is not concerned solely with eliminating employment practices that unjustifiably force an employee to choose between his religion and his job. Title VII extends to less onerous deprivations, forbidding discrimination with respect to *any* terms of employment (including compensation, conditions, or privileges) and requiring accommodation of conflicts between employment status and religious beliefs. See 42 U.S.C. 2000e(j).

Although the court of appeals properly rejected the district court's crabbed reading of Title VII, the court overstated the extent of an employer's accommodation obligation. According to the court of appeals, "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the *employee* prefers unless that accommodation causes undue hardship on the employer's conduct of his business" (Pet. App. 14a (emphasis added)). We disagree. The employer's duties under Title VII end once the employer offers the employee a reasonable accommodation. Under the literal terms of the statute, the undue hardship inquiry is necessary only where the employer claims that *no* reasonable accommodation is possible.

A "reasonable accommodation," within the meaning of Title VII, moreover, is concerned solely with reconciling conflicts between the employee's status as an employee and his religious beliefs. Hence, a proposed accommodation is not rendered "unreasonable" on the ground that it interferes with secular, nonemployment-related needs of the employee. For example, the reasonableness of an employer's proffered accommodation does not, unless motivated by an impermissible discriminatory motive, turn on its compatibility with competing demands on the employee's time generated by secular activities outside of work. The accommodation is reasonable as long as the employer has both eliminated any conflict between the employee's employment responsibilities and religious beliefs or observance and reasonably preserved the employee's employment status.

2. Whether the school board's leave policy satisfies Title VII is a difficult question which cannot be completely answered without further factual inquiry on remand. We agree with the intimation of both courts that Title VII does not generally require employers to provide employees with days of *paid* leave for observance of religious holy days. The gravamen of Philbrook's complaint, however, does not depend on a general claim of

entitlement to paid leave for mandatory religious observance. Philbrook bases a request for paid leave on his allegation that the school board's leave policy unlawfully discriminates against religion by expressly disallowing the use of "necessary personal business" paid leave for days of mandatory religious observance. An employer's leave policy is not unlawfully discriminatory, however, whenever it excludes the use of certain categories of paid leave for mandatory religious observance. An employer should normally be free to establish distinct categories of paid leave for specific, nonwork-related secular activities when the employer also provides a comparable category of paid leave for mandatory religious observance.

Whether the school board's leave policy impermissibly discriminates on the basis of religion, therefore, depends on the scope of the various paid leave categories provided for in the school board's contract. In particlular, if the "necessary personal business" leave category is narrowly drawn and applied, we perceive no legal infirmity in the school board's policy, primarily because the school board has provided for comparable paid leave for mandatory religious observance. If, on the other hand, the necessary personal business leave category is more broadly applied —granting, in effect, paid leave for any secular activity —the distinction drawn is of potential concern to Title VII. The trial court has not yet addressed these important factual questions and thus a remand is required. For similar reasons, we find unavailing the school board's alternative argument that the current record shows that further accommodation is, in all events, excused because it would cause "undue hardship." A finding of undue hardship, too, would be appropriate only after factual inquiry and findings by the trial court in the first instance.

Finally, we do not share the school board's view that the complaint should be dismissed because any further Title VII accommodation would impermissibly advance religion in violation of the Establishment Clause. "An

exemption adopted by Congress to accommodate religious beliefs [does] not violate the First Amendment's Establishment Clause" (*Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 n.19 (Burger, C.J.)). We therefore join respondent Philbrook in asking this Court to affirm the judgment below, reversing the district court's dismissal of the complaint and remanding the case for further proceedings.

ARGUMENT

AN EMPLOYER REASONABLY ACCOMMODATES THE RELIGIOUS BELIEFS OF AN EMPLOYEE WITHIN THE MEANING OF TITLE VII OF THE CIVIL RIGHTS ACT BY OFFERING THE EMPLOYEE A COMBINATION OF PAID AND UNPAID LEAVE FOR MANDATORY RELIGIOUS OBSERVANCE UNLESS THE EMPLOYER'S PAID LEAVE POLICY DISCRIMINATES AGAINST RELIGIOUS ACTIVITIES

This case concerns the extent to which Title VII requires employers to accommodate the religious beliefs of their employees. In Part A we discuss the responsibilities the statute places on employers generally. We conclude that an employer satisfies Title VII when he provides an accommodation that both eliminates any conflict between the employee's religious beliefs and employment requirements and reasonably preserves the employee's employment status. The express words of the statute also compel the conclusion that the employer meets his Title VII obligation by proposing to the employee one possible reasonable accommodation. The employer is not obliged to accept the particular accommodation preferred by the employee.

In Part B we discuss whether the school board's leave policy, which does eliminate any direct conflict between Philbrook's religious beliefs and his employment requirements, also reasonably preserves Philbrook's employment status. Generally an employer does not interfere with

the employee's employment status when it accommodates religious conflicts by providing for unpaid leave for religious holidays. But if the employer's paid leave policy discriminates against religion, the policy violates Title VII. Further factual inquiry is necessary to determine whether the school board's paid leave policy fails to preserve Philbrook's employment status by treating secular reasons for absences more favorably than religious reasons for absences.

Finally, in Part C we discuss whether either Title VII's nondiscrimination mandate or the Establishment Clause forbids accommodation efforts that, in effect, provide a "preference" or "privilege" to certain employees based on conflicts between their religious needs and employment status. We conclude that Title VII's literal terms *require* such accommodations in certain circumstances and that the Establishment Clause does not forbid that result.

A. An Employer Complies With Title VII When It Reasonably Accommodates The Religious Beliefs Of An Employee By Eliminating Any Conflict Between Those Beliefs And Employment Requirements While Reasonably Preserving The Employee's Employment Status

When Congress first enacted Title VII in 1964, the law provided, without elaboration, that employment discrimination on the basis of the employee's religion, like discrimination on the basis of race, color, sex, or national origin, was unlawful. Pub. L. No. 88-352, § 703, 78 Stat. 255. Not until Congress amended Title VII in 1972 did the law expressly require employers to accommodate the religious beliefs of employees. Pub. L. No. 92-261, § 2(7), 86 Stat. 103. The 1972 amendment, borrowing largely from revisions by EEOC in 1967 to guidelines first promulgated in 1966,[9] had "[t]he intent and effect of * * * mak[ing] it an unlawful employment practice under [Title VII] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).[10]

[9] The original EEOC guidelines outlining the accommodation duties of an employer provided that an employer should "accommodate * * * the reasonable religious needs of employees * * * where such accommodation can be made without serious inconvenience to the conduct of the business" (31 Fed. Reg. 8370 (1966)). In 1967, EEOC revised the guidelines to provide that the employer should "make reasonable accommodations to the religious needs of employees * * * where such accommodations can be made without undue hardship on the conduct of the employer's business" (32 Fed. Reg. 10298). The 1972 amendment to Title VII adopts much of the 1967 guideline. See note 10, *infra*.

In *Trans World Airlines, Inc.* v. *Hardison, supra*, this Court addressed the same issue posed in this case: "the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on [certain days]" (432 U.S. at 66). The statutory touchstone of employer compliance differs, however, in this case. In *Hardison*, the employer had *discharged* the employee because the employee, based on his religious beliefs, was unwilling to work on Saturdays. Hence, whether the employer had violated Title VII turned on whether the employer had demonstrated that it was unable reasonably to accommodate the employee's Saturday absences without undue hardship in the conduct of its business. This Court held that an accommodation eliminating the conflict would impose "undue hardship" on the employer because it would "require [the employer] to bear more than a *de minimis* cost" (*id.* at 84).

[10] Congress amended Title VII to include an express accommodation requirement by adding Section 701(j), which defines religion as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)).

In this case, the school board has not discharged Philbrook and it primarily contends that its leave policy already provides a reasonable accommodation. This case, therefore, concerns the distinct question (not addressed in *Hardison*) of what constitutes a reasonable accommodation, including whether the employer may choose its preferred accommodation when several are possible.

The courts below sharply differed in their responses to this basic issue of Title VII construction, but we believe that both courts, in different ways, misapprehended the scope of an employer's obligations under Title VII. The district court dismissed Philbrook's complaint on the threshold ground that he "ha[d] not been placed by the School Board or * * * by the Union * * * in a position of violating his religion or losing his job" (Pet. App. 37a). The trial court's disposition of the case, therefore, appears to rest on the supposition that Title VII's nondiscrimination mandate limits only employer decisions to discharge an employee.[11]

The court of appeals properly rejected this narrow view of Title VII's scope. Title VII is not concerned solely with employment discrimination resulting in discharge of an employee. Title VII is concerned as well with less onerous deprivations including those affecting the employee's "compensation, terms, conditions, or privileges of employment" (42 U.S.C. 2000e-2(a)(1)). Title VII, moreover, broadly denounces efforts by the employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" (42 U.S.C. 2000e-2(a)(2)).[12] An employer therefore must do more

[11] The school board presses the analogous argument that "the failure to provide such a benefit does not support a charge of discrimination under Title VII." See Pet. Br. 21; see also Equal Employment Advisory Council Amici Br. 9-14; AFL-CIO Amicus Br. 5-12.

[12] The argument of amicus AFL-CIO (Br. 5-12) that Congress made religious discrimination unlawful due primarily to congressional concern with religious observers being denied employment altogether is not to the contrary. The AFL-CIO agrees that compliance with Title VII includes a duty not to inflict "hardships needlessly" (Br. 9 n.4) and not to discriminate with respect to the terms of employment (*id.* at 12-14).

than just eliminate any conflict between the employee's religious beliefs and employment requirements. The employer's accommodation obligations under Title VII extend to efforts to *preserve* the employee's employment status, including both employment opportunities and privileges.[13] See *American Postal Workers Union* v. *Postmaster General*, 781 F.2d 772, 776-777 (9th Cir. 1986).

The court of appeals, however, erred in *overstating* the extent of an employer's accommodation obligations under Title VII. Its conclusion that an employer must, absent a showing of undue hardship, accept the particular accommodation preferred by the employee is inconsistent with the clear import of the statutory language. Title VII provides that it is unlawful for an employer to discriminate on the basis of religion "unless an employer demonstrates that he is unable to reasonably accommodate * * * an employee's * * * religious observance or practice without undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)). Under the

[13] For this reason, the school board's attempt (Pet. Br. 14-15) to draw support from this Court's Free Exercise precedent is misguided. The Free Exercise Clause allows certain neutral systems of awarding benefits, but, "[a]s a matter of legislative policy," Congress enacted Title VII "to make religious accommodations" and, consequently, different considerations apply. *Cf. Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 (Burger, C.J.). The school board's analogy (Pet. Br. 18-20) to decisions of this Court involving allegations of sex-based discrimination is similarly flawed. Under the school board's erroneous reading of Title VII, an employer who treated all religions the same—by refusing any accommodation to all—would comply with Title VII. Title VII's prohibition on religious discrimination, however, includes an affirmative accommodation requirement that is not expressly extended to other prohibited categories of discrimination such as discrimination on the basis of sex.

literal terms of the statute, the employer need rely on a showing of "undue hardship" only in those cases where the employer is claiming that *no* reasonable accommodation is possible. "[U]ndue hardship" therefore is simply a defense to an employer's failure to offer a reasonable accommodation. As long as the employer *is* reasonably accommodating the employee, the employer is under no obligation to show that an alternative accommodation preferred by the employee would cause it undue hardship. The sole judicial inquiry is whether the employer's proposed accommodation is reasonable.

Furthermore, because the statutory language requires only a "reasonable" accommodation of an employee's religious needs, his employment status need not be absolutely preserved. Cf. *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985), slip op. 2 (O'Connor, J., concurring). Reasonable preservation of employment status is sufficient. When the burdens on employment status are de minimis, employment status has been reasonably preserved, but the adverse effects, if any, should not be material and substantial. Whether a particular accommodation reasonably preserves employment status turns, moreover, on an *objective* assessment of the employment relationship. And because the employer inherently retains its traditional management prerogatives to the extent they do not directly conflict with Title VII's requirements, the employer, not the employee, has the right to choose among reasonable accommodations.[14] Cf. *United Steelworkers* v. *Weber*, 443 U.S. 193, 207 (1979); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978).

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[14] In assessing the reasonableness of the accommodation provided by the employer, courts should consider the range of alternative accommodations suggested by the EEOC's guidelines. 29 C.F.R. 1605.2(d). However, if an employer selects one accommodation suggested by the guidelines over another suggested accommodation, or if the employer selects a different accommodation that the court nonetheless finds to be reasonable, the employer need not show that the employee's preferred accommodation would cause undue hardship.

Moreover, the reasonableness of an employer's proffered accommodation does not turn on its compatibility with competing demands on the employee's time generated by secular activities outside of work.[15] Thus, neither the employee's own subjective assessment of the accommodation nor his secular, *non*-employment related needs are relevant to the inquiry. See *American Postal Workers Union*, 781 F.2d at 776. Title VII is concerned only with redressing impermissible discrimination within the employment relationship and not with rewriting employment contracts to redress employee grievances generally.[16]

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[15] For example, an employee may find a particular accommodation involving a shift in work hours undesirable because he would prefer not to work with certain other employees or because the new schedule would conflict with outside recreational interests. Neither of these considerations, however, would bear on the reasonableness of the accommodation within the meaning of Title VII. Title VII requires accommodation of the employee's religious beliefs, including preservation of the employment relationship, not accommodation of secular, nonemployment related interests of the employee. Such matters are, as always, governed by specific employment contracts and outside the scope of Title VII, unless, of course, an employee demonstrated that the employer deliberately selected a particular accommodation adverse to the employee because of his religious beliefs or observances in order "to discriminate invidiously or * * * covert[ly] suppress[] * * * particular religious beliefs." See *Bowen* v. *Roy*, slip op. 9.

[16] This reading is not inconsistent with the current EEOC guidelines which provide that "the employer * * * must offer the alternative which least disadvantages the [employee] *with respect to his or her employment opportunities*" (29 C.F.R. 1605.2(c)(2)(ii) (emphasis added)). The guidelines confirm that only impacts on the employee's employment status are relevant. We do not believe the guidelines should be read as endorsing the view that a mere de minimis or insubstantial burden on an individual's employment status is sufficient to render a proposed accommodation unreasonable. Certainly neither the statutory language of Title VII nor its legislative history suggests such a lopsided construction of either the term "reasonable" or "accommodation." See, *e.g.*, 118 Cong. Rec. 706 (1972) (remarks of Sen. Randolph) ("usually the * * *

B. The School Board Policy Of Providing An Employee With Paid And Unpaid Leave For Mandatory Religious Observance Is Reasonable As A Matter Of Law Unless The School Board's Paid Leave Policy Discriminates Against Religion

1. For the reasons previously given (pages 15-16, *supra*), we agree with the school board that if the current leave policy provides a reasonable accommodation,[17] remand for an undue hardship inquiry is unnecessary and Philbrook's complaint should be dismissed. Because, however, we believe that further factual inquiry is necessary to determine whether the current accommodation is reasonable, we nonetheless conclude that remand is warranted and support the judgment of the court of appeals.

We agree at the outset with the intimation of both courts below that Title VII does not generally require employers to provide employees with days of *paid* leave for observance of religious holy days.[18] Indeed, an em-

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employer and the employee[] are of an understanding frame of mind and heart * * * and * * * desire to achieve an adjustment"); see also *American Postal Workers Union* v. *Postmaster General*, 781 F.2d 772, 777 (9th Cir. 1986) (stressing need for "bilateral cooperation"); *Brener* v. *Diagnostic Center Hospital*, 671 F.2d 141, 145-146 (5th Cir. 1982) (same).

[17] The court of appeals' statement (Pet. App. 13a-14a) that the school board's accommodation was reasonable was rooted in its erroneous assumption that Title VII would nonetheless require an undue hardship inquiry. The statement was not based, as required by Title VII, on consideration of the degree to which the accommodation eliminated conflicts between the employee's religious observances and work requirements, while preserving employment status.

[18] The district court dismissed Philbrook's complaint based, in part, on the court's view that Philbrook claimed such a general entitlement to paid leave for religious holy days. See Pet. App. 35a, 36a. The court of appeals appears to have agreed that Title VII creates no such general entitlement and to have ruled in favor of Philbrook only because the court concluded that Philbrook's claim did not rest on such a broad proposition. *Id.* at 18a & n.9, 20a.

ployer proposal to allow an employee to take *unpaid* leave for observance of religious holy days would, in many circumstances, constitute a reasonable accommodation as a matter of law. See, *e.g.*, *Pinsker* v. *Joint Dist. No. 28J of Adams & Arapahoe*, 735 F.2d 388, 391 (10th Cir. 1984); cf. *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 564 (1981) ("[A] 'reasonable accommodation' to employee-reservists because of missed worktime has already been made by Congress in [the statute]. There, Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence."). Direct conflict between employment requirements and religious beliefs is eliminated by the provision of unpaid leave because the employer is not requiring the employee to work on a religious holy day. And, at least as a general proposition, "[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status" (*Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 145 (1977)).[19]

The basic premise of the employment relationship is, of course, that the employer provides compensation in exchange for work performed by the employee. If the employee is denied a day's pay for a day *not* worked, he has not suffered any denial of a privilege or condition of employment and thus has suffered no burden on his

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[19] Current EEOC guidelines support the reasonableness of an accommodation in which the employer offers the employee unpaid leave. The guidelines provide that a "[r]easonable accommodation * * * is generally possible where a voluntary substitute with substantially similar qualifications is available" (29 C.F.R. 1605.2 (d) (1) (i)). Presumably, the employer is not obliged to pay *both* the substitute and the employee taking time off from work. Former EEOC guidelines speak more directly and leave no doubt as to the reasonableness of an accommodation allowing unpaid leave. See 31 Fed. Reg. 8370 (1966) ("An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect.").

employment status. He has simply been denied a "bonus" beyond that generally granted to his fellow employees for secular purposes. Title VII does not compel subsidization of an employee's religious beliefs beyond that provided to other employees for similar secular purposes. See *Pinsker* v. *Joint Dist. No. 28J of Adams & Arapahoe*, 735 F.2d at 391 (school board was not required to provide plaintiff with additional paid leave for religious observance beyond the two days of "special leave" provided to all employees).

The commonsense notion that unpaid leave provides a reasonable accommodation as a matter of law is not, however, without limitation. An employer's leave policy may impermissibly discriminate against religion by, for example, providing paid leave for certain secular, non-employment related activities, but denying paid leave for similar religious activities. Title VII does not "unconditionally impos[e] upon employers an obligation to continue to pay their employees their regular paychecks when they absented themselves from work for [religious] reasons * * *[, but such payments may be required if a]n employer 'discriminates' against an employee [by] treat[ing] that employee less favorably than he treats other similarly situated" (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 18-19 (1980) (footnote omitted)).[20]

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[20] So, too, if the relative amount of unpaid leave that must be taken by the employee is substantial, the employer should be obliged to consider the possibility of a shift in work hours. Cf. *Monroe* v. *Standard Oil Co.*, 452 U.S. at 564; *id.* at 575 (Burger, C.J., dissenting) ("[important] 'incident or advantage of employment' [includes] opportunity for full-time work undiminished by * * * absences for military training"). For example, if the employee's current work schedule requires him to take off one day each week for the Sabbath, an employer's proposal to allow unpaid leave would not amount to a reasonable preservation of employment status; the relative amount of unpaid leave required would be substantial. See 29 C.F.R. 1605.2(d). If, moreover, the employer conducts business 24 hours a day, seven days a week, the employer should consider the possibility of a shift in work hours that would allow the employee to work full-time. Cf. *ibid.* Of course, as in *Hardison*, the employer might well establish that a work-schedule change causes undue hardship. See 432 U.S. at 76-77. The employee would nonetheless be entitled to that additional consideration and a hardship showing.

2. Philbrook's complaint does not depend, at bottom, on the general claim that Title VII entitles employees who need to take days off for religious observance with paid leave. If it did, we would readily agree with the school board that the complaint should be dismissed. Nor does the complaint depend on the equally erroneous notion that the school board's leave policy is discriminatory because the amount of paid leave is inadequate. Cf. *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985).[21] Instead, Philbrook complains that the school board's leave policy discriminates against religion by barring the use of "necessary personal business" leave for mandatory religious observance (J.A. 3-4).

The school board's fairly intricate leave policy provides many specific categories of paid leave, including three days of paid leave for mandatory religious observance. It also provides three days of paid leave for "necessary personal business," but leave for "necessary personal business" may not be used for any purpose described in the specific leave categories, and thus may not be used for religious leave.

As a general rule, an employer is free to establish distinct and exclusive categories of paid leave for specific,

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[21] We disagree with the proposition, advanced by the court of appeals, that the school board's leave policy "facially discriminates on the basis of religion" because it "afford[s] some teachers all the [paid] leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year" (Pet. App. 12a). This Court rejected a similar contention in *Alexander* v. *Choate*, *supra*. There, the Court held that a 14-day limitation on inpatient hospital coverage for Medicaid recipients did not discriminate against handicapped recipients in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, even assuming that the limitation might disproportionately affect the handicapped.

nonwork-related secular activities as long as the employer also provides a comparable category of paid leave that can be used for mandatory religious observance.[22] Moreover, an employer's leave policy is not impermissibly discriminatory whenever it excludes the use of certain categories of paid leave for mandatory religious observance. Surely the school board does not discriminate against Philbrook by forbidding him from using the five days allocated for "death in the family" for his religious observance. Nor does an atheist employee suffer discrimination when he is denied use of the three days for religious observance to supplement some other specified leave category.

Thus we agree with the court of appeals that "[t]he critical factual question * * * is the past and current scope of the personal business leave provisions" (Pet. App. 16a). Although Title VII does not impose limitations on the employer's authority to structure a leave policy as long as the categories of leave either are so open-ended as to provide the employee with complete discretion, or are strictly confined to employment-related purposes, the school board's "necessary personal business" category raises the important question whether leave for secular, nonemployment purposes is being granted more generously than leave for religious purposes. If, as amicus AFL-CIO contends (Br. 14-17), the necessary personal business leave category is both narrowly drawn and applied, we would agree that its exclusion of religious leave, in addition to other types of secular leave, does not amount to impermissible religious discrimination. If, however, the "necessary personal business" category is, in practical effect, an all-purpose secular leave provision that the union contract provides *in addition to* the array of specific secular paid leave categories also included in the leave policy, we would agree with Philbrook (as would amicus AFL-CIO (Br. 13-14)) that the overall leave policy discriminates against religion in violation of Title VII.

[22] This is not to say that every time an employer provides any leave for a limited, specific, secular purpose it must make leave available for religious purposes in order reasonably to preserve the religious observer's employment status. For instance, Title VII would certainly not require that an employer who allows employees paid leave for personal illness, must, for that reason, provide paid leave for religious holidays. Nor would an employer always be required to establish paid religious leave if it provides *any* leave for some secular, nonemployment related purpose—such as military duty—in order reasonably to accommodate the religious needs of its employees.

Based on the current record, however, we can only speculate as to the actual scope of the necessary personal business category and for this reason we believe that remand is warranted. As the court of appeals noted (Pet. App. 16a-17a), although the wording of the leave category, particularly the term "necessary," suggests a narrow construction, the category's allowance for teacher discretion and Philbrook's claim that such leave is freely granted for secular purposes create substantial doubt about the category's actual scope in application.[23] Moreover, because the district court applied an incorrect legal standard, remand is appropriate to permit the trial court to apply the correct legal standard to the facts of this case in the first instance. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982).[24]

[23] Of course, while the court of appeals concluded the remand was necessary to consider the school board's undue hardship (Pet. App. 17a), we believe remand is necessary to address whether the school board's current accommodation, as reflected in its leave policy, discriminates against religion.

[24] Even if this Court should find as a matter of law that the school board's leave policy is not a reasonable accommodation, remand would be necessary because the scope of the necessary personal business leave category would bear on the school board's ability to demonstrate undue hardship. For example, if the necessary business provision was broadly applied in practice, the school board would be hard-pressed to contend that extending its scope to include religious holy days would cause undue hardship.

3. Philbrook's remaining contentions may be disposed of briefly. Philbrook argues that the school board's current accommodation is unreasonable because the cost of a substitute teacher is less than his lost salary for a day of absence and, consequently, the school board's reduction of his pay is excessive. But Philbrook's request is simply a slight variation on the notion, already rejected, that Title VII entitles employees to paid leave, regardless of its treatment of other employees. Absent a showing (and we know of none) that the school board follows the novel policy of providing employees absent for secular reasons with the equivalent of an employment agency's commission (based on any salary differential), Philbrook's request lacks merit.

Philbrook's related argument that the school board's current accommodation is unreasonable because the school board has not considered the possibility of allowing him to do meaningful work at school at other times is similarly unavailing. This case is not one where the availability of work-schedule changes limits the reasonableness of using unpaid leave to accommodate an employee's religious beliefs (see note 20, *supra*). The purpose of a work-schedule shift is to allow the employee to accomplish the same (or equivalent) work, but at a different time. What Philbrook requests is the right to do some other "meaningful work" at a different time, presumably because he can only teach his classes at certain prescribed times. We do not believe that the employer's accommodation obligation extends to determining whether it might be able to employ the individual in a *different* capacity.[25]

[25] Notably, Congress has chosen to "reasonably accommodate" the religious beliefs of federal employees by allowing federal employees to "elect to engage in overtime work for time lost for meeting * * * religious requirements" (5 U.S.C. 5550a). Consistent with the explicit statutory concern with maintaining the efficiency of government operations, the implementing regulations provide that the employing federal agency need not allow such a shift in work

C. Accommodation Of Philbrook's Religious Beliefs Neither Offends Title VII Nor Implicates The Establishment Clause

The school board (Pet. Br. 28-30) suggests that Title VII does not require further accommodation of Philbook's religious beliefs because any additional accommodation would amount to unequal treatment of employees based on religion in violation of Title VII's nondiscrimi-

hours when it would "interfere with the efficient accomplishment of an agency's mission" (5 C.F.R. 550.1002(b)). See also 124 Cong. Rec. 15436 (1978) (remarks of Rep. Solarz) ("if the provision of overtime compensatory work provides an undue hardship on the agency or interfere[s] with its efficiency, the agency need not grant such work"). Members of Congress expressed their belief that forcing federal employees to "choose between meeting the requirements of their faith and suffering a reduction of income or a loss of vacation time * * * is unnecessary, in most cases." S. Rep. 95-1143, 95th Cong., 2d Sess. 10 (1978); 124 Cong. Rec. 15435 (1978) (remarks of Rep. Solarz) ("discriminatory and unnecessary"); *id.* at 15436 (remarks of Rep. Harris) ("unnecessarily punitive and discriminatory"). The Senate Report accompanying the legislation specifically added that "[f]ederal agencies are expected to find meaningful overtime work for employees who request overtime in anticipation of time lost for religious observance" (S. Rep. 95-1143, *supra*, at 11). Of course, how Congress chose, in its discretion, to accommodate the religious beliefs of federal employees does not establish a binding standard of reasonable accommodation on the private sector, particularly when Congress nowhere in the legislation or its legislative history indicated any intent to impose equivalent requirements on the private sector. Nor did Congress suggest that the legislation reflected its own interpretation of what constituted mandatory employer compliance with Title VII, which is applicable to federal employment (see 42 U.S.C. 2000e-16). The Senate Report refers only once to Title VII, and even then only as incidental support for its action. See S. Rep. 95-1143, *supra*, at 10. Testimony during the House hearings on the legislation refers to the federal need to comply with Title VII, but nowhere suggests *congressional* sentiment that the then-pending proposal was necessary to secure compliance with Title VII. See generally, *Leave Time for Observing Religious Holidays: Hearings Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. (1978).

nation mandate. Alternatively, the school board contends (*id.* at 30-31) that such unequal treatment would, if required by Title VII, impermissibly advance religion in violation of the Establishment Clause. Both contentions misapprehend the scope and meaning of Title VII's reasonable accommodation requirement.

Contrary to the school board's submission, Title VII's nondiscrimination mandate is not offended when an employer accommodates an employee's religious beliefs by providing the employee with a privilege not available to all employees. If it were, Title VII's reasonable accommodation obligation would be rendered meaningless. The fundamental premise of the reasonable accommodation obligation is that facially equal treatment, alone, is not necessarily sufficient under Title VII. Hence, an employer that discharges an employee who refuses, for religious reasons, to work on certain days of the week cannot defend the discharge solely on the ground that all employees are subject to the same employment requirements and penalties. Title VII requires that the employer demonstrate that it was unable reasonably to accommodate the employee without causing undue hardship to the conduct of the employer's business. To be sure, any accommodating step taken by the employer beyond facially equal treatment could be characterized as resulting in a religious "preference" or "privilege," but, whatever its label, Title VII cannot be read as prohibiting the very action plainly required by its literal terms.

Instead, Title VII's nondiscrimination mandate limits employer efforts reasonably to accommodate an employee's religious beliefs only to the extent that those efforts adversely affect the employment status, including employment opportunities and privileges, of *other employees*. Thus, as in *Hardison*, Title VII does not require that an employer give the employee a day off when the employer "would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath"

(432 U.S. at 81). But absent such adverse effects on the employment status of other employees, Title VII does not restrict employer efforts at reasonable accommodation.[26] Indeed, the contrary view might call into question the school board's current practice of granting Philbrook paid and unpaid leave for religious holy days. Accordingly, should the district court on remand find that the scope of the necessary personal business leave category is the equivalent of an all-purpose secular paid leave category, Title VII would not *prevent* the school board from allowing Philbrook to use such leave for religious holy days. There would be no apparent adverse effect on other employees; the school board would simply hire a substitute to take Philbrook's classes and other employees would be free, as before, to use their paid annual leave for the purposes specified in the collective bargaining agreement.[27]

Nor does the Establishment Clause bar the possibility of further accommodation in this case. Title VII is "a statute outlawing employment discrimination based on race, color, religion, sex, or national origin [and] has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society" (*Es-*

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[26] For example, an employer may allow an employee who is an Orthodox Jew to wear a yarmulke, notwithstanding a general prohibition on the wearing of headgear, without violating Title VII.

[27] We do not believe the Court's statement in *Hardison*, 432 U.S. at 85, that Title VII did not require the employer to adopt an accommodation in which "the privilege of having Saturdays off would be allocated according to religious beliefs" should be read as suggesting a different result. The Court's concern was with "constru[ing] [Title VII] to require an employer to discriminate *against* some employees" (*ibid.* (emphasis added)) and, in *Hardison*, the privilege of taking Saturdays off was clearly a privilege of employment under the collective bargaining agreement. Most importantly, allowing the religious employee to take Saturday off would either have interfered with the seniority rights of other employees to take the day off or have caused the employer undue hardship (*i.e.*, more than de minimis cost). See 432 U.S. at 84.

tate of Thornton v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985), slip op. 2 (citation omitted) (O'Connor, J., concurring). Although, Title VII may, as just described, sometimes require that the employer provide the employee "special" or "preferential" treatment in response to the employee's religious beliefs, such "treatment of religious practitioners does not present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' against which the Establishment Clause is principally aimed" (*Hardison*, 432 U.S. at 90-91 n.4 (Marshall, J., dissenting), quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970)). See *Bowen* v. *Roy*, No. 84-780 (June 11, 1986) (Burger, C.J.).

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Moreover, this Court has held that the Free Exercise Clause does mandate accommodation in the nature of a "preference" or "privilege." See *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The Establishment Clause should not prohibit the government from requiring private parties to take accommodating actions similar to those required by the Free Exercise Clause. The spectre of a constitutional collision between the Free Exercise and Establishment Clauses underscores the need to distinguish for Establishment Clause purposes between governmental actions and laws intended to "induce" religion and those intended merely to "accommodate" sincerely-held religious beliefs. In our view, although neutral governmental accommodation efforts, such as Title VII, may in some sense facilitate religious practice, they pose no threat to the fundamental principle of separation of church and state embodied in the Establishment Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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